

05-472 OCT 7 - 2005

No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

EMERSON DAVIS,
Petitioner,

vs.

WARDEN, FEDERAL TRANSFER CENTER,
OKLAHOMA CITY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

PREFACE Petitioner Emerson Davis, asserting that 28 U.S.C. §2255 relief was inadequate or ineffective under its Savings Clause, invoked §2241 habeas corpus jurisdiction. Section §2255 relief was not available. Davis' prior motion had been denied. Adequate relief under §2255 was curtailed by the denial of the Certificate of Appealability and the Petition for Certiorari. The AEDPA amendments barred a second motion only under §2255, but did not alter the Savings Clause proviso allowing traditional §2241 habeas corpus jurisdiction when §2255 relief "is inadequate or ineffective." Congress provided Savings Clause jurisdiction in recognition of Article I, Section 9, of the Constitution barring suspension of the writ of habeas corpus. The §2241 petition claimed illegal incarceration under an unconstitutional sentence.

The courts below dismissed, ruling no habeas corpus jurisdiction. The only available jurisdictional statute to entertain relief was 28 U.S.C. §2241.

Question 1: When there is no other available forum, should the federal court be jurisdictionally barred from determining §2241 habeas corpus petitions asserting *prima facie* meritorious grounds of unlawful incarceration by applying virtually unobtainable standards to the Savings Clause of §2255: "...unless it also appears that the remedy by [2255] motion is inadequate or ineffective to test the legality of his detention."

Question 2: Whether the actual innocence and miscarriage of justice principles applied to sentencing factors in capital cases to provide post conviction relief should be applied to Davis' non-capital life sentence to satisfy the Savings Clause "inadequate or ineffective" condition for §2241 jurisdiction.

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OPINIONS BELOW

The report of the United States Magistrate (not reported) adopted by the District Court for the Western District of Oklahoma is set out in Appendix F. The Opinion by the United States Court of Appeals for the Tenth Circuit (not reported) is set out in Appendix B.

JURISDICTION

Emerson Davis, while incarcerated in the F.T.C., Oklahoma City, Oklahoma, filed on December 4, 2003, an action for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241. The District Court for the Western District of Oklahoma adopted the Magistrate's Report (Appendix F) and granted Respondent's Motion to Dismiss on September 23, 2004. (Appendix E). The Final Judgment was entered on September 23, 2004. (Appendix D). A timely Motion to Reconsider was filed on October 7, 2004 and denied on October 12, 2004. (Appendix C). A timely Notice of Appeal was filed on October 21, 2004. The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 14, 2005 (Appendix B), and the timely petition for rehearing was filed on June 28, 2005, and denied on July 13, 2005. (Appendix A). A timely Petition for Writ of Certiorari will be filed with this Court on or before October 11, 2005. This Court has jurisdiction under 28 U.S.C. §1254.

RELEVANT STATUTES

28 U. S. C. §2255 (in relevant part):

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.... An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, **unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.** (emphasis added)

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U. S. C. §2241 (in relevant part):

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--....(3) **He is in custody in violation of the Constitution or laws or treaties of the United States...** (emphasis added)

STATEMENT OF THE CASE

Emerson Davis sought habeas corpus relief for his continued incarceration under an unconstitutional sentence. Emerson Davis, while in the Oklahoma City Federal Transfer Center, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2241 on December 4, 2003. The petition and supporting memorandum asserted the factual and legal grounds demonstrating relief was not available or effective under §2255 and relief was proper under §2241. Davis contended that he had not been given full and adequate relief and was entitled to invoke §2241 under *Sanders v. United States*, 373 U.S. 1 (1963). Davis' prior §2255 motion and Certificate of Appealability had been denied. The Petition for Certiorari was denied on November 3, 2003, 540 U.S. 997. Davis' sentence of life imprisonment without parole was for a conviction involving conspiracy to distribute

cocaine, cocaine substance, and marijuana. The maximum lawful sentence would have been five (5) years.

The matter was referred to the United States Magistrate who directed the United States Attorney to file an answer. The Respondent moved the court to dismiss for want of jurisdiction under §2241 or to transfer the case to the sentencing court (Northern District of Florida). Petitioner expressly urged the court to follow Seventh Circuit and Ninth Circuit precedent rejecting transfer. Petitioner Davis filed additional and supplemental memoranda relating to whether relief was unavailable or ineffective under §2255, whether the denial of the Certificate of Appealability foreclosed full opportunity for adequate and effective relief, whether jurisdiction existed under §2241 for the unconstitutional sentence, and whether the "actual innocence and miscarriage of justice" standards were applicable to provide relief.

The Magistrate's Report (Appendix F) did not dispute Davis' constitutional claim that the sentence was unlawful or deny that relief now was procedurally barred and unavailable under §2255. The Report ignored arguments that the prior §2255 motion was inadequate and ineffective because of the denial of the Certificate of Appealability notwithstanding Supreme Court and Court of Appeals precedent that the sentence was illegal.

The Magistrate's Report stated that §2241 was limited to execution of the sentence and not the validity of a sentence and the "inadequate and ineffective" conditions for jurisdiction under the Savings Clause were not satisfied. The District Court adopted the Magistrate's Report and dismissed for lack of jurisdiction under §2241.

The Tenth Circuit, by Order dated June 13, 2005 (Appendix B), affirmed the dismissal for want of habeas corpus jurisdiction under §2241. The Tenth Circuit's unpublished order stated the only remedy was with the

sentencing court, without acknowledging that a second motion would be barred:

As Petitioner's application clearly seeks a remedy only available through a motion under 28 U.S.C. §2255 [the sentencing court] is the proper forum.

(Appendix B, p. 3)

The Tenth Circuit rejected, without discussion, Petitioner's arguments concerning the preclusion of effective relief by denial of the Certificate of Appealability and concerning the application of the actual innocence and miscarriage of justice principles. Petitioner's arguments under *Sanders*, 373 U.S. 1 (1963) and *Hayman*, 342 U.S. 205 (1952) against suspending or barring habeas corpus relief were ignored. Petitioner also extensively demonstrated the merits of the claim of unconstitutional confinement. The court stated the unavailability of §2255 relief for a second motion was not relevant to whether the relief is either "inadequate or ineffective":

It is Petitioner's burden to show that §2255 remedy is inadequate or ineffective, and a previous failure to obtain relief under §2255 does not establish that the remedy so provided is either inadequate or ineffective.

(Appendix B, p. 3)

The timely petition for rehearing was denied on July 13, 2005. This Petition for Certiorari will be filed on or before October 11, 2005.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THIS COURT SHOULD GRANT CERTIORARI TO PROTECT HABEAS CORPUS JURISDICTION UNDER THE SAVINGS CLAUSE AND THE CONSTITUTION

The result below defeats the right to invoke traditional habeas corpus jurisdiction that Congress sought to preserve and protect by the Savings Clause in recognition of Article I, Section 9 of the Constitution. This jurisdictional right conferred by the Savings Clause arises when §2255 relief "is inadequate or ineffective." The ruling below conflicts with the rationale of decisions by this Court concerning the constitutionality of limitations upon habeas corpus.

Congress enacted the Savings Clause in 1948, when jurisdiction for post conviction relief was established in the court where sentenced instead of the court where incarcerated. There was little need to resort to this constitutional safety valve prior to the enactment of the Anti-Terrorist Effective Death Penalty Act (AEDPA) in 1996 because successive motions could be filed under §2255. A second motion is now barred except in the rare case where the Supreme Court itself makes a constitutional rule expressly retroactive. An appeal now may be taken only if a Certificate of Appealability is granted unlike the right to appeal under §2241.

Following the AEDPA, hundreds of attempts to invoke §2241 jurisdiction have been filed by petitioners whose prior relief under §2255 was denied.¹ Further relief

¹ Of the 58,257 prisoner petitions filed in 2000, approximately twenty percent were by federal inmates, one-third of which were habeas corpus (approximately 3,800). The number of habeas corpus petitions filed by federal prisoners after a prior denial of §2255 was not provided